

Rule 13, Ariz. R. Crim. P.

INDICTMENT AND INFORMATION – Duplicitousness: Single count charging multiple crimes or crimes against multiple victims may be duplicitous and require curative jury instructions.....Revised 11/2009

A duplicitous indictment is one that charges two or more distinct and separate offenses in a single count. Arizona law requires that each charged offense be charged in a separate count in an indictment, information, or complaint. See Rule 13.3(a), Ariz. R. Crim. P.¹ In addition, Article 2, § 23 of the Arizona Constitution guarantees every criminal defendant the right to a unanimous jury verdict.² “Since Arizona law requires that each separate offense be charged in a separate count, an indictment which charges more than one crime within a single count may be dismissed as duplicitous.” *State v. Schroeder*, 167 Ariz. 47, 51, 804 P.2d 776, 780 (App. 1990). Charging more than one act in a single count is forbidden because it does not provide a defendant with adequate notice of the charge against which he must defend, presents a hazard of a non-unanimous jury verdict, and makes a precise pleading of double jeopardy impossible in the event of a later prosecution. *State v. Davis*, 206 Ariz. 377, 389, ¶ 54, 79 P.3d 64, 76 (2003) [*citing State v. Whitney*, 159 Ariz. 476, 480, 768 P.2d 638, 642 (1989)].

Sometimes a defendant commits a series of criminal acts against a single victim in a single incident but is only charged with a single offense, even though the State

¹ That subsection provides in part: “Provided that each is stated in a separate count, 2 or more offenses may be joined in an indictment, information, or complaint, if” certain conditions are met.

² That subsection provides in part: “In all criminal cases the unanimous consent of the jurors shall be necessary to render a verdict.”

could have charged the defendant with multiple offenses against that victim. If the series of acts is not part of a single transaction or a continuing scheme, the single count may be duplicitous. In a similar situation, sometimes a defendant commits a single act involving multiple victims, but is charged with only a single offense, alleged as being committed against any or all of the victims. In such cases, the single count is duplicitous, and the trial court should instruct the jury that they must unanimously agree on the specific act constituting the offense.

An example of multiple offenses against the same victims is seen in *State v. Solano*, 187 Ariz. 512, 930 P.2d 1315 (App. 1996). In that case, the defendant first pointed a gun at two victims and demanded their car. The victims jumped in the car and drove away. The defendant chased them in his car and when the victims' car crashed, shot into the car, killing one victim. He was charged with one count of aggravated assault as to each victim by using a gun to place each victim in reasonable apprehension of imminent physical injury. At trial, he moved to dismiss the charges as duplicitous because the record showed he had committed two separate acts of aggravated assault against each victim – once by pointing the gun at them before the chase and once by firing the gun after the chase. *Id.* at 519, 930 P.2d 1322. He contended that this evidence “presented the risk of a non-unanimous jury verdict because it would be impossible to tell whether the jurors unanimously agreed that he committed an aggravated assault as to each victim prior to or after the chase.” *Id.* The trial judge refused to dismiss the charges. Instead, the judge instructed the jury that they must “unanimously agree on the specific act of gun related assaultive conduct as to each alleged victim” before they could find the defendant guilty of a single aggravated

assault. *Id.* The Court of Appeals found that this instruction was proper, noting that the series of acts against each victim was a single incident and constituted a single assault against each. *Id.* at 520, 930 P.2d at 1323.

An example of one act committed against multiple victims is *State v. Whitney*, 159 Ariz. 476, 768 P.2d 638 (1989). In that case, the Arizona Supreme Court again found that an indictment charging only one crime was not duplicitous even though it involved two victims. In that case, the defendant picked up two hitchhiking girls. When he made a sexual advance toward one girl, the girls asked him to stop the truck and let them out. He at first refused, but eventually did stop his truck. When he stopped, the girls got out of the truck and ran away. The defendant drove after the girls, trying to run them over. The information charged the defendant with aggravated assault by intentionally using his truck to place victim A and/or victim B in reasonable apprehension of immediate physical injury. The defendant claimed that the indictment was duplicitous because he could be convicted on a non-unanimous verdict, apparently reasoning that some jurors could decide that he had pursued only victim A and others could conclude that he had pursued only victim B. The Arizona Supreme Court found that the indictment was not duplicitous. The Court reasoned that the defendant “was charged with one count of aggravated assault based on his pursuit of the two girls with his pickup truck. Even though the effect of his actions was an assault on both girls, the count in question is predicated on a single act.” *Id.* at 480, 768 P.2d at 642. The Court also noted, “even if the count was duplicitous, it could be cured by a proper instruction.” The trial court’s instruction made it clear that “the jury had to find that the defendant’s action in chasing the girls with his pickup was one aggravated assault,” and the Court

found that the jury had convicted for the single act of chasing the two girls. *Id.* Additionally, the Court found that the defendant was not denied any essential right to his defense because he did not claim that he had chased only one of the girls – instead, he claimed that the victims’ story was a complete fabrication. *Id.* Thus, the Court affirmed the defendant’s conviction.